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IN THE
SUPREME COURT OF THE UNITED STATES

No._____

October Term 1984

84-1207

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, COMMISSIONER WILLIAM LEEKE, WARDEN GEORGE MARTIN AND STATE OF SOUTH CAROLINA AND THE ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,

Petitioners,

vs.

FLOYD M. DOBY, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN I. MAULDIN
710 East McBee Avenue
Greenville, S.C. 29601
(803) 271-3812

STEPHEN JOHN HENRY
12 Lavinia Avenue
Greenville, S.C. 29601
(803) 271-3563

ATTORNEYS FOR THE RESPONDENT

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THE CASE

The Respondent, an indigent, is incarcerated in the South Carolina Department of Corrections where he has resided since his murder conviction and life sentence on June 15, 1978. This case was initiated in federal district court by Respondent on November 11, 1981 pursuant to 28 U.S.C. Section 2254. Respondent's case has focused from its initiation on one primary contention: That the trial judge impermissibly relied upon the truth of Respondent's alleged confession when determining its admissibility. The district court denied habeas corpus relief on August 29, 1983 and the Fourth Circuit Court of Appeals panel unanimously reversed and remanded with direction to issue the requested writ at 741 F.2d 76. Petitioner's subsequent petition for rehearing was also rejected by a unanimous panel. Petitioner now seeks a writ of certiorari claiming that the Fourth Circuit's decision granting relief creates an "intolerable conflict with other circuit and state courts and is probably not an (sic) accord with the decisions of this court."

SUMMARY OF ARGUMENT

The decision below was in accordance with the body of law that has, since Rogers v. Richmond, 365 U.S. 534 (1961), made impermissible the reliance upon the truth of a confession on the part of a trial judge in determining that confession's admissibility and is not in conflict with the Fifth Circuit Court of Appeals decision in United States v. Kreczmer.

ARGUMENT

I. The lower court decision does not conflict with U.S. v. Kreczmer in that in both decisions the principle was upheld that it is impermissible for a trial judge to consider the truth or falsity of a confession in ruling on its admissibility.

In U.S. v. Kreczmer, 636 F.2d 108 (5th Cir., 1981) the Fifth Circuit clearly and strongly stated the Rogers v. Richmond, 365 U.S. 534 (1961) principle relied upon by the lower court in the instant case:

> "In Rogers v. Richmond, citations omitted, the Supreme Court held that it is impermissible to consider the truth or falsity of a confession in ruling on its voluntariness. This decision has been adhered to consistently and implemented both in decisions of the Supreme Court and of this court."

Both Kreczmer and the lower court decisions merely reaffirm the Rogers principle. That different factual backgrounds lead to ultimately different conclusions does not, as Petitioner seems to argue, create an intolerable conflict requiring resolution by the United States Supreme Court. That different facts produce different results is not a basis for a writ of certiorari.

Quite clearly, the Fifth and Fourth Circuits, applying the Rogers principle correctly and consistently, found in one case (Kreczmer) that the trial judge had not considered the truthfulness of the confession as an admissibility factor and in the other case (Doby) that the truthfulness had been a factor. The two courts reached different results on their particular facts. The principle applied in each case remained true to Rogers. No conflict exists. Factual distinctions such as exist here must be tolerated.

II. The lower court decision reflects the recognition of a blatant violation of Rogers v. Richmond not present in U.S. v. Kreczmer.

For the sake of maintaining its tenuous foot-hold on a slippery position, Petitioner selectively omitted the abundant references by the trial court to the alleged truthfulness of Respondent's confession.

This selective omission is purposeful since in Kreczmer the Fifth Circuit relied heavily on the fact that:

> "In the entire report, the magistrate mentioned the truthfulness of the confession only in the single statement quoted above." at page 110.

The passing reference by the magistrate led the Kreczmer court to conclude that "the truthfulness of the confession was not a factor."

Quite apparently the lower court, applying the principle of Rogers and Kreczmer was required to find a violation in the face of the overwhelming evidence that the truthfulness of the confession was a factor in the trial judge's decision to admit it into evidence.

The lower court quoted the extensive comments by the trial judge to defense counsel, witnesses and to the jury which clearly showed that the trial judge here, unlike the magistrate in Kreczmer, relied upon the alleged truthfulness in deciding the confession's admissibility. These comments include the "what about the truth" colloquy quoted below:

> "(Defense Counsel - Mr. Allen)
> I feel that the Court should consider the most relevant things we've brought out, not only Floyd's testimony both direct and cross, not so much what the questions were, but what the Court saw, and how he responded.
> And also the doctors' background information on him, his performance level in school, his IQ, his psychological diagnosis, and all these things just go to the fact that he could not have intelligently waived his Miranda rights. That's really the only issue we're talking about.

THE COURT: How about the truth?
MR. ALLEN: Sir:
THE COURT: How about the truth? Truth.
MR. ALLEN: I don't understand the question.
THE COURT: How about the truth? you say we're not concerned with anything except his understanding of his Miranda rights.
MR. ALLEN: In this hearing.
THE COURT: Oh, yeah, yeah.
Do you have any law on the middle ground between truth and legal right?
MR. ALLEN: No sir, I mean -
THE COURT: Is there any?
MR. ALLEN: Explain your question, please, I don't understand it.
THE COURT: Do you have any law on the middle ground between truth and legal right?
MR. ALLEN: No sir, I haven't. I'm not sure exactly what the Court's asking, but I do have the law on the fact --
THE COURT: That's the dilemma that I'm in.
MR. ALLEN: Well, sir, it seems certainly arguable --
THE COURT: It's a real dilemma.
MR. ALLEN: -- and goes to the totality of the circumstances, and these officers, being officers of the Court as you and I are, should have provided that man, after they saw; and they can't deny that they saw the type of person Fooyd (sic) is, that is readily apparent, I don't think any one would deny that; even after seeing that they did not afford him counsel, because Floyd didn't know to ask for it, because he didn't understand it."

This entire dialogue during the in camera hearing on the issue of the confession's admissibility appeared in the trial record and was quoted in its entirety in the lower court's opinion. It would be difficult to imagine more conclusive evidence that the judge in this case did consider the truthfulness. It is evident that the Kreczmer magistrate's passing one-line reference to the truth of the defendant's statement in that case followed immediately by the statement that he was "not passing on its truthfulness" is not in the same league with Respondent's trial judge's steadfast determinaiton that the truth would be a factor in his ruling.

By itself, the "what about the truth" colloquy is enough of a distinction between the present case and the Kreczmer result. However, in addition, the trial judge pursued the "truth" issue with a psychiatric witness and even after the verdict with the jurors as follows:

> "(Trial Court):
> I can announce in the present (sic) of this jury now, however, that during the in-camera hearing on the admissibility of the alleged confession, after hearing the psychiatrists and after hearing the officers, and the manner in which the statement was taken, as I instructed the jury following that some two-three hour hearing Tuesday night - or was it Monday night, I've forgotten - whatever, I concluded as a matter of law that the jury was entitled to consider that. After hearing the confession I became convinced in my own mind that some of the contents of that document could have been known only to the killer of Sally Ann Hutchinson. I won't go into enumerating them."

Can there be any doubt that the trial court violated Rogers, and indeed the Rogers principle recognized in Kreczmer? Petitioner can succeed on this issue only if the principle in Rogers itself is reversed. There is no basis upon which to conclude that Kreczmer and the lower court decision are fundamentally at odds.

CONCLUSION

The rationale for granting certiorari to resolve conflicts among the circuits is to achieve a uniform application of federal law in the intermediate federal court system. Petitioners have not, in accordance with Rule 17 of this Court, presented a sufficient conflict since any conflict between the Fifth and Fourth Circuit decisions cited, can be accounted for on the basis of variations in the factual situations presented in the two cases. Each case is totally consistent with this Court's ruling in Rogers v. Richmond. There having been no conflict demonstrated among the circuits, the petition for writ of certiorari should be denied.

Respectfully submitted by:
JOHN I. MAULDIN
STEPHEN JOHN HENRY

By: Stephen J. Henry
Attorneys for the Respondent

Greenville, South Carolina

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